

*United States Court of Appeals
for the Second Circuit*

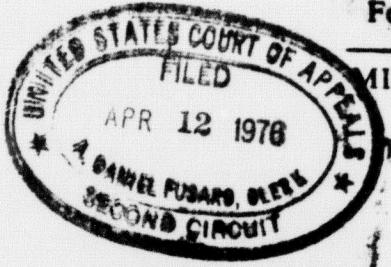


**APPELLANT'S
APPENDIX**

76-7076

In The
United States Court of Appeals

For The Second Circuit



MILDRED A. McLEARN,

Plaintiff-Appellant.

v.s.

ARTHUR COWEN, JR., JOSEPH V. PERRI, DANIEL F. O'HARA, SR., GEORGE N. COWEN, WILLIAM F. NEUBERT, JOSEPH H. BILLINGS, JOSEPH A. DE SENA, MATTEO MOSCA, WILLIAM JAMES CHARLTON, JR., ARTHUR COWEN III, WILFRED T. LEAHY, JOSEPH M. COHEN, ALBERT G. LOWENTHAL, DONALD LOUIS VANECK, GERARD MEYER, JOHN BRADLEY GREENE (Dayton), JAMES R. WEIL, ANTONIO G. PINTO, JOSEPH L. HIBERT, WILLIAM J. CHARLTON, JR., ROBERT W. DILL, JR., WILLIAM J. REYNOLDS, ROBERT E. BUETTI, ANGELICO A. CROPELLI, JOSEPH G. TIMPONE, LEE J. SPIEGELBERT, LEONARD C. KLINE, ALVIN J. SMITH, d/b/a COWEN & CO., BARRETT SINIWITZ & LEONARD FUCHS, individually, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

B P/s

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

APPENDIX FOR PLAINTIFF-APPELLANT

BURCHETTA, GOLDSAND & BURCHETTA, P.C.

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TABLE OF CONTENTS

	Page
Docket Entries	1a
Notice of Appeal (Dated February 9, 1976) .	2a
OrderAppealed From (Filed January 12, 1976)	3a
Amended Verified Complaint (Filed Sep- tember 30, 1975)	6a
Notice of Motion Dated November 7, 1975 . .	52a
Affidavit of James B. May in Support of Motion (Dated November 7, 1975) . . .	54a
Notice of Motion Dated November 12, 1975 .	57a
Memorandum in Support of Notice of Mo- tion Dated November 7, 1975	59a
Memorandum in Support of Notice of Mo- tion Dated November 12, 1975	65a
Memorandum in Opposition to Both No- tices of Motion Dated November 26, 1975 .	69a

DOCKET ENTRIES

75 CIV. 1963 MILDRED MCLEARN v. COWEN & CO., ET AL

<u>Date</u>	<u>Proceedings</u>
3-31-75	Filed Complaint and issued summons.
4-7-75	Filed summons and Marshals returns - served: Merrill Lynch Pierce Fenner & Smith, Inc. by F.K. Flannery - 4-1-75 Leonard Fuchs by Albert Rosenthal - 4-1-75 Barrett Siniwitz by Albert Rosenthal - 4-1-75 Cowen & Co. by Albert Rosenthal - 4-1-75
4-23-75	Filed by deft. Cowen & Co., exhibits and notice of motion to dismiss under Rule 12(b) and 9(b) -- ret. 5-6-75
4-23-75	Filed deft. Cowen & Co.'s memorandum in support of above motion.
4-23-75	Filed deft. Cowen & Co.'s interrog.
4-23-75	Filed stip. and order that the time of deft. Merrill Lynch to answer complaint is ext. to May 6, 1975. So ordered, Metzner, J.
5-2-75	Filed memorandum in support of Merrill Lynch's joinder in motion to dismiss.
5-2-75	Filed by deft. Merrill Lynch Pierce Fenner & Smith, affdvt. and notice of motion to dismiss under Rule 12(b) and 9(b) - ret. 5-6-75
5-8-75	Filed plaintiff's memorandum in opposition.
5-8-75	Filed stip. and order substituting Attorney for deft. Merrill Lynch -- Metzner, J.
5-14-75	Filed affdvt. of service of pltf's memorandum in opposition.
5-13-75	Filed Marshals returns - served:

Docket Entries

<u>Date</u>	<u>Proceedings</u>
	Barrett Siniwitz by A.C. Pinto - 5-5-75 Leonard Fuchs -- unable to serve.
7-31-75	Filed OPINION #42892...The complaint is dismissed with leave to file an amended complaint within 20 days of the date of this order. So ordered. -- Metzner, J. m/n
8-20-75	Filed pltf's affdvt. and notice of motion for an order extending pltf's time to file an amended complaint to October 1, 1975 etc. as indicated. ret. on Aug. 29, 1975 at 10:00.
9-10-75	Filed memo endorsed on document #13: Motion granted. So ordered. -- Metzner, J. m/n
9-30-75	Filed AMENDED COMPLAINT, affdvt. of service attached -- served Willkie Farr & Gallagher, Atty. for deft. Cowen & Co. - 9-30-75 Brown Wood Fuller Caldwell & Ivey, Atty. for deft. Merrill Lynch, et al 9-30-75
11-10-75	Filed deft. Merrill Lynch, Pierce, Fenner & Smith's exhibits, affdvt. and notice of motion under Rule 12(b) and 9(b) dismissing the amended complaint. - ret. 11-28-75
11-10-75	Filed memorandum of law in support of above motion.
11-14-75	Filed deft. Cowen & Co.'s notice of motion to dismiss under Rule 12(b) for failure to aver the allegations of fraud. - ret. 11-28-75
11-14-75	Filed deft. Cowen & Co.'s memorandum in support of above motion.
12-1-75	Filed pltf's memorandum in opposition
1-12-76	Filed OPINION #43705..The amended complaint is dismissed. So ordered Metzner, J. m/n

Docket Entries

<u>Date</u>	<u>Proceedings</u>
1-12-76	Filed notice of change of firm name of Attorney for deft.
1-13-76	Filed memo endorsed on document #15: This motion is granted - see opinion #43705 on campanien motion to dismiss the complaint. So ordered. -- Metzner, J. m/n 1-15-76 Judgment entered - Clerk.
2-17-76	Filed pltfs notice of appeal to the USCA for the 2nd Circuit from order dismissing amended complaint. Copies mailed to Willkie, Farr & Gallagher, Esqs. and Brown, Wood, Ivey, Mitchell & Petty, Esqs.

NOTICE OF APPEAL
(Dated February 9, 1976)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

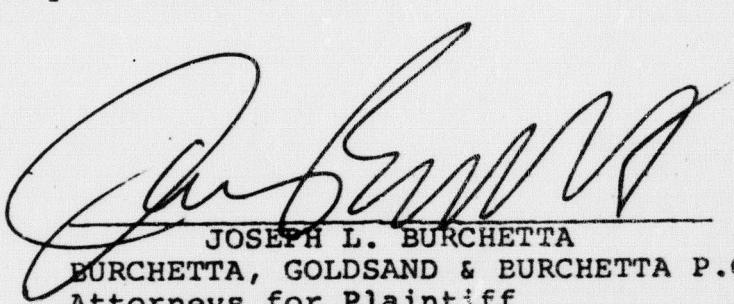
MILDRED A. MCLEARN, : 75 Civ. 1563
Plaintiff : Judge Metzner
against : NOTICE OF APPEAL
COWEN & CO., MERRILL LYNCH PIERCE :
FENNER & SMITH, INCORPORATED, :
BARRETT SINIWITZ and LEONARD FUCHS, :
Individually, :
Defendants.

-----X

S I R S :

Notice is hereby given that the plaintiff, MILDRED A. MCLEARN, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judge Metzner dismissing plaintiff's amended complaint dated January 12th, 1976 entered in this action on the 15th day of January, 1976.

DATED: Carmel, New York
February 9th, 1976


JOSEPH L. BURCHETTA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILFRID A. MCLEARN

plaintiff

-against-

Civ. 1563
(CMM)

COWEN & CO., MERRILL LYNCH, PIERCE,
FENNER & SMITH, INCORPORATED,
BARRETT, BINWITZ and LEONARD FUCHS
Individually.

Defendant's

WITTENER, D. J.:

Defendants Cowen & Co. and Merrill Lynch, Plaintiff.

Penner & Smith, Incorporated, move to dismiss the amended
complaint for failure to allege fraud with sufficient
particularity as required by Rule 9(b) of the Federal
Rules of Civil Procedure.

On July 30, 1975, the original complaint, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), and Rule 10b-5 promulgated thereunder, and Sections 205 and 206, as amended, of the Investment Advisors Act of 1940 (15 U.S.C. § 80b-5, 80b-6), was dismissed with leave to file an

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plaintiff's original complaint. At that time I held that it failed to state the facts and circumstances of the fraud alleged.

The amended complaint fails to correct the deficiencies of the original one. All but eight of its paragraphs are taken verbatim from the original com-

plaint. In the other eight, plaintiff has merely added more conclusory allegations and restated those of the original complaint. It is replete with references to "allowing to exercise prudent judgment," and "acting in good faith," etc. The changes are in language rather than substance. The complaint still fails to set forth the facts and circumstances of the alleged fraud and must be dismissed. Falken v. Walston and Co., 508 F.2d 577 (2d Cir. 1974); Segal v. Gordon, 467 F.2d 502 (2d Cir. 1972).

Plaintiff contends that she has pleaded every fact known to her and that much of the information about the alleged fraud is within the knowledge of defendants. This does not excuse her failure to plead with the requisite particularity. A complaint "should serve to seek redress and not to conceal, just as we find one in Wolff v. London, supra 508 F.2d 577." The amended complaint is dismissed.

5a

U. S. D. J.

JUDGMENT ENTERED - 11/15/76

Appealed 17 Brgy last 17

AMENDED VERIFIED COMPLAINT
(Filed September 30, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILDRED A. MC LEARN,

Plaintiff,

: INDEX NO.

-against-

ARTHUR COWEN, JR., JOSEPH V. PERRI, DANIEL F. O'HARA, SR., GEORGE N. COWEN, WILLIAM F. NEUBERT, JOSEPH H. BILLINGS, JOSEPH A. DE SEMA, MATTEO MOSCA, WILLIAM JAMES CHARLTON, JR., ARTHUR COWEN III, WILFRED T. LEAHY, JOSEPH M. COHEN, ALBERT G. LOWENTHAL, DONALD BOUIS VANECK, GERARD MEYER, JOHN BRADLEY GREENE (Dayton), JAMES R. WHIL, ANTONIO G. PINTO, JOSEPH L. HUBERT, WILLIAM J. CHARLTON, JR., ROBERT W. DILL, JR., WILLIAM J. REYNOLDS, ROBERT E. BUETTI, ANGELICO A. GROPPELLI, JOSEPH G. TIMPONE, LEE J. SPIEGELBERT, LEONARD G. KLINE, ALVIN J. SMITH, d/b/a COWEN & CO., BARRETT SINIWITZ and LEONARD FUCHS, individually, MERRILL, LYNCH, PIERCE, PENNER & SMITH, INCORPORATED,

: *Complaint*
VERIFIED
COMPLAINT

Defendants.

:

The plaintiff, by and through her attorneys, BURCHETTA, GOLDSAND & BURCHETTA, P.C., complaining against the defendants herein alleges:

JURISDICTION & VENUE

FIRST: That this action arises under the Securities and Exchange Act of June 6, 1934, Chapter 4, Stat. 881, 15 U.S.C. 78; and Rule S-10B-5 promulgated pursuant thereto. (17 C.F.R. Sec. 240. 106-5), and the Investment Advisors Act of 1940; 15 U.S.C. 80 b-5, and 15 U.S.C. 80b-6.

SECOND: That the jurisdiction of this Court is invoked pursuant to the provisions of the Securities and Exchange Act of June 6, 1934, Sec. 27, 48 Stat. 902 (15 U.S.C. Sec. 78 aa) and 15 U.S.C. 80b-4.

THIRD: Venue is placed in the Southern District of New York due to the fact that the plaintiff and the defendants reside in the district, and the defendants, upon information and belief transact business within the district, and that the activities complained of took place within said district.

AS AND FOR THE FIRST CLAIM ON BEHALF
OF THE PLAINTIFF AGAINST COWEN & CO.
LEONARD FUCHS AND BARRETT SINIWITZ,
INDIVIDUALLY.

FOURTH: That at all times material hereto, the plaintiff was and still is a citizen of the United States, residing in the County of Westchester, State of New York.

FIFTH: That at all times material hereto, the defendant, COWEN & CO., was and still is a partnership having a usual place of business for the transaction of business at One Battery Park Plaza, New York, New York.

SIXTH: Upon information and belief, at all times relevant in this action, each of the following were partners in the partnership, COWEN & CO.; ARTHUR COWEN, JR., JOSEPH V. PERRI,

DANIEL F. O'HARA, SR., GEORGE N. COWEN, WILLIAM F. NEUBERT, JOSEPH H. BILLINGS, JOSEPH A. DE SENA, MATTEO MOSCA, WILLIAM JAMES CHARLTON, JR., ARTHUR COWEN III, WILFRED T. LEAHY, JOSEPH M. COWEN, ALBERT G. LOWENTHAL, DONALD LOUIS VANECK, GERARD MLYER, JOHN GRADLEY GREENE (Dayton), JAMES R. WEIL, ANTONIO C. PINTO, JOSEPH L. HIBERT, WILLIAM J. CHARLTON, JR., ROBERT W. DILL, JR., WILLIAM J. REYNOLDS, ROBERT E. BUETTI, ANGELICO A. GROPPELLI, JOSEPH G. TIMPONE, LEE J. SPIEGELBERG, LEONARD C. KLINE and ALVIN J. SMITH.

SEVENTH: That at all times material hereto, defendants BARRETT SINIWITZ and LEONARD FUCHS were employed by COWEN & CO.; BARRETT SINIWITZ as a customer's broker, and LEONARD FUCHS as an investment advisor. The said defendants' businesses were conducted through COWEN & CO. facilities, and upon information and belief, the said defendants were COWEN & CO.'s duly authorized representatives, agents, servants and employees.

EIGHTH: That at all times material hereto, the defendants, COWEN & CO., through their employees or agents, the defendant partners thereof, and BARRET SINIWITZ and LEONARD FUCHS, as agents and representatives of COWEN & CO., and individually, communicated to the plaintiff; and each of them made certain representations through the use of the United States mail and interstate telephone and interstate commerce, and said representations were made to induce and consummate certain unlawful representations, schemes and business fraud on said

plaintiff.

NINTH: That the plaintiff, MILDRED A. MC LEARN, on or about March, 1971, was approached by BARRETT SINIWITZ, a representative of COWEN & CO., who asked if plaintiff held or owned any stocks, and if so, could said defendants BARRETT SINIWITZ and COWEN & CO. supply information with respect to future investments. Defendant BARRETT SINIWITZ then introduced plaintiff, MILDRED A. MC LEARN, to defendant LEONARD FUCHS, an investment advisor employed by the defendant COWEN & CO. The defendants, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO., insisted that said plaintiff enter into an agreement with them for the future investment of stocks owned and held by the plaintiff. The defendants insisted that an arrangement, if any, must include a complete power of attorney for LEONARD FUCHS and COWEN & CO.. and that, in addition to usual brokerage and other fees, defendant would also receive as compensation for their services, twenty (20%) percent of realized capital gains from the sale and reinvestment of the securities in plaintiff's accounts.

TENTH: That plaintiff, MILDRED A. MC LEARN, while considering the aforementioned investment arrangement, sold bonds and forwarded to the defendants sufficient assets to purchase one (1,000) thousand shares of Redman Industries.

ELEVENTH: That defendants, during this period, induced the plaintiff, MILDRED A. MC LEARN, into agreeing to the afore-

mentioned investment arrangement claiming that defendants could better plaintiff's position with stocks that would be a hedge against inflation.

TWELFTH: That on or about May 5, 1971, the plaintiff, MILDRED A. MC LEARN, was scheduled to leave the country for an extended period of time, and as a result of defendant's inducements and advices, delivered certain securities and cash to the said defendants, and gave defendants a general power of attorney over them to manage and invest them for her benefit. Plaintiff also further agreed that, in addition to usual brokerage and other fees, defendants would also receive, as compensation for their services, twenty (20%) percent of the realized capital gains from the sale and reinvestment of the securities in plaintiff's account.

THIRTEENTH: That the defendant, LEONARD FUCHS, was at all times herein mentioned, affiliated with said defendant, COWEN & CO., in the capacity as an investment advisor with respect to plaintiff's account with said firm.

FOURTEENTH: That plaintiff, MILDRED A. MC LEARN, went to England on or about May 6, 1971, and remained there for more than six (6) months.

FIFTEENTH: That during November, 1971, plaintiff, MILDRED A. MC LEARN, returned to the United States and met the

defendants, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO., at the office of COWEN & CO., together with LAURA MC LEARN STITCHER, plaintiff's daughter, and MICHAEL MC LEARN, plaintiff's son.

SIXTEENTH: That at said meeting, defendants requested that the stocks owned individually by plaintiff's children, LAURA (MC LEARN) STITCHER and MICHAEL MC LEARN, be handled by defendants in a similar manner and with the same arrangement as plaintiff, MILDRED A. MC LEARN's account. LAURA (MC LEARN) STITCHER and MICHAEL MC LEARN agreed to said arrangement only upon the assurances of their mother, plaintiff MILDRED A. MC LEARN, that she would guarantee them against any losses. Furthermore, that prior to and at said meeting, defendants requested that plaintiff, MILDRED A. MC LEARN, deliver to defendants other securities and cash owned by plaintiff, and said plaintiff, in reliance upon defendant's advices, did in fact deliver other securities and cash to defendant, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO., for management and reinvestment.

SEVENTEENTH: That thereafter, the investments made by defendants for plaintiff's account commenced dwindling in value, and thereafter continued to dwindle in value.

EIGHTEENTH: That the defendants, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. failed to exercise prudent judgment,

acted in bad faith and breached the fiduciary obligation owed by said defendants to the plaintiff in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform plaintiff that the stocks purchased for her were speculative in nature and involved substantial risk for a person in plaintiff's position which position was known to the defendants and each of them; in acting totally without plaintiff's knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of plaintiff's account by repeatedly informing plaintiff that her account was in good financial condition and well secure so as the deceit plaintiff which statements did in fact deceive plaintiff; in repeatedly omitting to inform plaintiff of material facts with respect to securities recommended for purchase and for sale from plaintiff's account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for plaintiff, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for a widow with plaintiff's limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived;

in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to the plaintiff and otherwise acted in an illegal, negligent, unethical, and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility.

NINETEENTH: That thereafter, defendants notified plaintiff that her account had dwindled in value to such an extent that additional cash or sale of securities would be required to maintain marginal limitations.

TWENTIETH: That plaintiff, MILDRED A. MC LEARN, thereupon became alarmed and caused the account to be transferred to another firm in full, and suffered substantial losses and expense in salvaging what was left therein.

TWENTY-FIRST: That plaintiff was not advised in advance of the quantities of each security which defendants proposed to purchase, nor of the margins which defendants made with respect to the said purchases, and took no part in the management and selection of the purchases made, except for her final decision to close the account with defendants and have

another firm take it over.

TWENTY-SECOND: That at all times plaintiff relied on the judgment and integrity of defendants and was unaware of the reckless risks which defendant were taking with her securities and cash.

TWENTY-THIRD: The arrangements made with plaintiff and defendants, and the actions of the defendants aforementioned were illegal, prohibitive and in violation of the provisions of the Investment Advisors Act and the Securities Act of 1934.

TWENTY-FOURTH: That as a result of the foregoing, the plaintiff was caused to sustain substantial monetary damages and was otherwise damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

AS AND FOR A SECOND CLAIM ON BEHALF
OF THE PLAINTIFF AGAINST COWEN & CO.
AND LEONARD FUCHS AND BARRETT
SINIWITZ, INDIVIDUALLY

TWENTY-FIFTH: Plaintiff repeats and realleges each and every allegation contained in the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

TWENTY-SIXTH: That between March, 1971, and December 1972, the defendants BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. and the partners of COWEN & CO., conspired to get her and

maliciously and willfully entered into a scheme to defraud and deceive the plaintiff and embarked upon a deliberate design and purposed to coerce and pressure the plaintiff into entering into a prohibitive, illegal and unethical contract and investment arrangement whereby the defendants induced the plaintiff into giving said defendants a complete power of attorney, and that in addition to usual brokerage and other fees, defendants would also receive as compensation for their services, twenty(20%) percent of realized captial gains from the sale and reinvestment of the securities in plaintiff's account so that defendants would realize profits and fees at plaintiff's expense.

TWENTY-SEVENTH: In pursuance of the said conspiracy and scheme, the defendants did the acts and things hereinafter alleged, and all of such acts and things were participated in and done by all of the defendants, or by one or more of them as steps in the said conspiracy and for the purpose of defrauding and deceiving the plaintiff as hereinbefore alleged.

TWENTY-EIGHTH: Among the acts committed by the defendants in furtherance of the conspiracy aforesaid are the following: in meeting with plaintiff at the offices of COWEN & CO. in furtherance of the conspiracy, in coercing and pressuring the plaintiff herein to enter into an illegal, prohibitive and unethical investment arrangement or contract; in failing to exercise purdueant judgment, acted in bad fāāth and breached the

the fiduciary obligation owed by said defendants to the plaintiff in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform plaintiff that the the stocks purchased for her were speculative in nature and involved substantial risk for a person in plaintiff's position which position was known to the defendants and each of them; in acting totally without plaintiff's knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of plaintiff's account by repeatedly informing plaintiff that her account was in good financial condition and well secure so as to deceit plaintiff which statements did in fact deceive plaintiff; in repeatedly omitting to inform plaintiff of material facts with respect to securities recommended for purchase and for sale from plaintiff's account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for plaintiff, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for a widow with plaintiff's limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse develop-

ments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to the plaintiff and otherwise acted in an illegal, negligent, unethical and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility, and the defendants committed numerable acts in furtherance of the conspiracy.

TWENTY-NINTH: That as a result of the foregoing, the plaintiff was caused to sustain substantial monetary damages and was otherwise damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

AS AND FOR A THIRD CLAIM ON BEHALF OF
THE PLAINTIFF AGAINST MERRILL, LYNCH,
PIERCE, FENNER & SMITH, INCORPORATED.

THIRTIETH: That at all times material hereto, the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, was and still is a corporation, incorporated under the law of the State of New York, with a usual place of business at One Liberty Plaza, 165 Broadway, New York, New York.

THIRTY-FIRST: That at all times material hereto, WILLIAM A. SCHREYER, IRA L. DAVIS, ROBERT FOY and DONALD REGAN, were associated with defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, as duly authorized representatives, agents, servants and employees.

THIRTY-SECOND: That at all times material hereto, the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, through their employees and agents, and WILLIAM A. SCHREYER, IRA L. DAVIS, ROBERT FOY and DONALD REGAN, as agents and representatives of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and individually, communicated to the plaintiff; and each of them, made certain representation through the use of the United States Mail and Interstate telephone and interstate commerce, and said representations were made to induce and consummate certain unlawful representations, schemes and business fraud on said plaintiff.

THIRTY-THIRD: That on or about the Fall of 1972, the plaintiff, MILDRED A. MC LEARN, contacted the executive offices of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and asked for a meeting and interview with the highest executive they would afford plaintiff. Thereafter, plaintiff met at the offices of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, with WILLIAM A. SCHREYER, Regional Vice-President, who, upon information and belief, was in charge of all brokers employed by

MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, in their northeast operation.

THIRTY-FOURTH: That the plaintiff, MILDRED A. MC LEARN informed, explained and discussed with WILLIAM A. SCHREYER, in detail, illegal and unethical activities of COWEN & CO., and the partners of COWEN & CO., BARRETT SINIWITZ and LEONARD FUCHS, described in detail in the causes of action numbers "ONE" through "THREE" of this complaint. The plaintiff further advised MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and WILLIAM A. SCHREYER that she was a widow and could not afford another debacle. WILLIAM A. SCHREYER assured plaintiff that her interest would be protected and her investments secure if she should decide to transfer her account to MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

THIRTY-FIFTH: That on or about November, 1972, the plaintiff entered into an investment arrangement or agreement whereby MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, agreed to assign to the plaintiff one of their most experienced brokers, and Assistant Vice-President of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS. MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS presented plaintiff with an investment portfolio and encouraged and persuaded plaintiff that said portfolio was safe for a person in

plaintiff's position.

THIRTY-SIXTH: That plaintiff, MILDRED A. MC LEARN, relied upon the experience of one of the "world's most experienced and knowledgeable brokerage concerns", and was assured by MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS that defendants investments recommendations protected plaintiff, and that they should be followed, and that if plaintiff did not wish to follow recommendations, the plaintiff would not have availability to IRA L. DAVIS, who at that time they claimed was an experienced and highly qualified broker.

THIRTY-SEVENTH: That thereafter, plaintiff, MILDRED A. MC LEARN, contacted defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS, and informed them that she wished to change and alter her investments. MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS informed the plaintiff that there was no danger, and that if she insisted, then IRA L. DAVIS would no longer be available to her for investment purposes.

THIRTY-EIGHTH: That thereafter, plaintiff, MILDRED A. MC LEARN, received a phone call from MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and IRA L. DAVIS informing plaintiff that her investments were in trouble and that they were required

to start selling some of said investments due to a margin call.

THIRTY-NINTH: That thereafter, plaintiff, MILDRED A. MC LEARN, contacted by telephone MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and WILLIAM A. SCHREYER to discuss the recent phone call of IRA L. DAVIS concerning plaintiff's account. WILLIAM A. SCHREYER informed plaintiff that he would return plaintiff's phone call within twenty (20) minutes, but in fact, said defendant never returned plaintiff's phone call.

FORTIETH: That thereafter, plaintiff received a phone call from ROBERT A. FOY of the MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED legal department. When plaintiff answered said phone call, ROBERT A. FOY stated, "I am the hatchet man." ROBERT A. FOY then requested that plaintiff select the stocks which she wished to be sold for the margin call aforementioned.

FORTY-FIRST: That said plaintiff informed MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and defendant, ROBERT A. FOY, she wished MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED to sell each and every investment made by them for her, and that she did not wish her investments to be nibbled away to nothing while putting the responsibility on plaintiff.

FORTY-SECOND: That thereafter, plaintiff, by telegram, contacted DONALD REGAN, representative and agent of MERRILL, LYNCH,

PIERCE, FENNER & SMITH INCORPORATED to inform him of plaintiff's conversation with ROBERT FOY, and informed DONALD REGAN that plaintiff holds him personally responsible for what happened to plaintiff's capital which he invested with the advice of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

FORTY-THIRD: That thereafter, plaintiff contacted the Park Avenue Office of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, and asked to speak with JAMES MC CARTHY, the manager of said office, for the purpose of requesting of said manager, that he furnish plaintiff with a broker other than IRA L. DAVIS, for the purpose of plaintiff liquidating all of the stocks MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED had purchased for her. The plaintiff was informed that JAMES MC CARTHY was not available and could not speak to her. Immediately thereafter, plaintiff contacted, by telephone, WILLIAM A. SCHREYER's office and was again informed that MR. SCHREYER was unavailable and could not talk to the plaintiff. Plaintiff was further informed that every executive capable of assigning a broker was in uptown Manhattan having lunch, and that they would be unavailable. Plaintiff then called DONALD REGAN's office and was informed by a representative of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, who identified himself as a member of the customer complaint department, that DONALD REGAN was unavailable to discuss plaintiff's account. Eventually, after four (4) hours of

telephone attempts, plaintiff was able to contact the Assistant Manager of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED's Park Avenue Office. Plaintiff instructed said Assistant Manager to put the buys and sells through immediately.

FORTY-FOURTH: That the defendant, MERRILL, LYNCH, PIERCE, FENNER, & SMITH INCORPORATED did not follow plaintiff's instructions, and at the close of the market that day, said defendant did not transact plaintiff's orders. The next day, plaintiff, unannounced, appeared at the offices of WILLIAM A. SCHREYER, and was eventually able to speak to said defendant. WILLIAM A. SCHREYER and MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED's attorney, ROBERT FOY, outlined the position of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED in the letter forwarded to plaintiff after said meeting.

FORTY-FIFTH: That thereafter, plaintiff, called the office of DONALD REGAN requesting a meeting to discuss plaintiff's account. Plaintiff received no answer from him or any other representative or agent of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

FORTY-SIXTH: That thereafter, plaintiff was caused to forward to DONALD REGAN, by telegram, a message requesting that plaintiff hear from him personally.

FORTY-SEVENTH: That on or about the 29th day of June,

1973, to the present date, the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and the individual defendants, WILLIAM A. SCHREYER, IRA L. DAVIS, ROBERT FOY and DONALD REGAN, have not contacted plaintiff to discuss plaintiff's account.

FORTY-EIGHTH: That on or about the 29th day of June, 1973, plaintiff received a telephone call from ROBERT FOY to inform plaintiff that an executive Vice President would see plaintiff sometime in the middle of July, when said Vice President returned from his vacation. Plaintiff informed ROBERT FOY that that was not satisfactory to her and that she wished to speak to DONALD REGAN.

FORTY-NINTH: That the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED by and through their agents, servants and representatives, WILLIAM A. SCHREYER, IRA L. DAVIS and ROBERT FOY, acted in bad faith, failed to exercise prudent judgment, and breached the fiduciary obligation owed by the defendant to the plaintiff in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform plaintiff that the stocks purchased for her were speculative in nature and involved substantial risk for a person in plaintiff's position which position was known to the defendants and each of them; in acting totally without plaintiff's

knowledge, acquiescence and specific consent; in making untrue representations concerning condition of plaintiff's account by repeatedly informing plaintiff that her account was in good financial condition and well secure so as to deceit plaintiff which statements did in fact deceive plaintiff; in repeatedly omitting to inform plaintiff of material facts with respect to securities recommended for purchase and for sale from plaintiff's account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for plaintiff, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for a widow with plaintiff's limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made; in encouraging a cause of conduct which was unprofessional, unethical and in violation of the fiduciary duties owed by defendant to plaintiff in coercing and pressuring the plaintiff into acquiescing and consenting to an investment arrangement under the threat that un-

less plaintiff consented to the same the plaintiff would be given a qualified, experienced and capable broker; in refusing to accept the power of attorney thereby escaping the responsibility for intimidating the plaintiff by telling plaintiff she could have access to one of the defendants top customer brokers if plaintiff follows advise without question and informing plaintiff that buying a part of America business through MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and the New York Stock Exchange member firms is a good way to increase one's financial worth without adequately revealing the inherit risk and defendants otherwized breached fiduciary duty owed to the plaintiff and otherwise acted in an unprofessional, negligent, illegal and unethical manner.

FIFTY: That at all times plaintiff relied upon the judgment and integrity of defendants and was unaware of the reckless risks which defendants were taking with plaintiff's securities, cash and investments.

FIFTY-FIRST: That a fiduciary relationship existed between plaintiff and defendants by reason of the general agency granted to them for compensation, the trust and confidence placed in them and the status of the parties.

FIFTY-SECOND: That the foregoing conduct on the part

of the defendants is a breach of the common law standards of fiduciary responsibility in any court of competent jurisdiction. That as a result of the foregoing, plaintiff was damaged in the sum of FIVE MILLION (\$5,000,000.00) DOLLARS.

AS AND FOR A FOURTH CLAIM ON BEHALF OF
THE PLAINTIFF AGAINST COWEN & CO.,
LEONARD FUCHS AND BARRETT SINIWITZ,
INDIVIDUALLY.

FIFTY-SECOND; Plaintiff repeats and realleges each and every allegation of the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

FIFTY-THIRD: That on October 4, 1974, MICHAEL M. MC LEARN, the son of the plaintiff, MILDRED A. MC LEARN, by Assignment of Claims, assigned and transferred all of his right, title and interest in and to all causes of actions and/or claims for damages that the plaintiff, MILDRED A. MC LEARN, may have against COWEN & CO., BARRETT SINIWITZ and LEONARD FUCHS, their members, agents, and employees, and any and all other third persons presently known or unknown, who may have acted in concert with them, jointly and severally, arising out of and connected with investment in various stocks and securities. The aforementioned Assignment of Claim granted to the plaintiff herein, the unrestricted right to sue for recovery for any such damages in any court of competent jurisdiction, Annexed hereto

and made a part of this complaint is a copy of said Assignment of Claim.

FIFTY-FOURTH: That at all times material hereto, the defendants, COWEN & CO., through their employees or agents, the defendant ~~and~~ partners thereof, and BARRETT SINIWITZ and LEONARD FUCHS, as agents and representatives of COWEN & CO., and individually, communicated to MICHAEL MC LEARN; and each of them, made certain representations through the use of the United States mail and interstate telephone and interstate commerce, and said representations were made to induce and consummate certain unlawful representations, schemes and business fraud on said MICHAEL MC LEARN.

FIFTY-FIVE: That during November of 1971, MICHAEL MC LEARN met the defendants, BARRETT SINIWITZ, LEONARD FUCHS, and COWEN & CO., at the office of COWEN & CO., together with plaintiff and LAURA (MC LEARN) STITCHER, plaintiff's daughter.

FIFTY-SIXTH: That at said meeting, defendants requested that the stocks owned individually by MICHAEL MC LEARN be handled by defendants in a similar manner and with the same arrangement as plaintiff, MILDRED A. MC LEARN's account, as described in ~~paragraph~~ "NINTH" herein.

FIFTY-SEVENTH: That MICHAEL MC LEARN entered into an

an agreement with the defendants, whereby MICHAEL MC LEARN gave defendants a complete power of attorney and that, in addition, the usual brokerage and other fees, defendants would also receive as compensation for their services, twenty percent of realized capital gains from the sale and reinvestment of the securities in MICHAEL MC LEARN's account.

FIFTY-EIGHTH: That thereafter, the investments made by defendants for MICHAEL MC LEARN's account commenced dwindling in value, and thereafter continued to dwindle in value.

FIFTY NINTH: That the defendants, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. failed to exercise prudent judgment, acted in bad faith and breached the fiduciary obligation owed by said defendants to him in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform plaintiff that the stocks purchased for him were speculative in nature and involved substantial risk for a person in his position which position was known to the defendants and each of them; in acting totally without his knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of his account by repeatedly informing him that his account was in good financial condition and well secure so as to deceit him, which statements did in fact deceive him; in repeatedly omitting to inform him of material facts with respect to securities recommended for pur-

chase and for sale from his account including the degree or risk involved in purchasing particularly securities defendants chose to purchase for him, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for him with his limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to him and otherwise acted in an illegal, negligent, unethical and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility.

SIXTIETH: That thereafter, defendants notified MICHAEL M. MC LEARN that his account had dwindled in value to such an extent that additional cash would be required to maintain marginal limitations.

SIXTY-FIRST: That MICHAEL M. MC LEARN therupon became alarmed and caused the account to be transferred to another firm in full, and suffered substantial losses and expense in salvaging what was left therein.

SIXTY-SECOND: That MICHAEL M. MC LEARN, in no case, was advised in advance of the quantities of each security which defendants made with respect to the said purchases, and took no part in the management and selection of the purchases made, except for his final decision to close the account with defendants and have another firm take it over.

SIXTY-THIRD: That at all times MICHAEL M. MC LEARN relied on the judgment and integrity of defendants and was unaware of the reckless risks which defendants were taking with his securities and cash.

SIXTY-FOURTH: The arrangements made with MICHAEL M. MC LEARN and the defendants, and the actions of the defendants aforementioned were illegal, prohibitive and in violation of the provisions of the Investment Advisors Act and the Securities Act of 1934.

SIXTY-FIFTH: That as a result of the foregoing, the plaintiff was caused to sustain substantial monetary damages and was otherwise damaged in the sum of TWO MILLION (\$2,000,000.00)

DOLLARS.

AS AND FOR A FIFTH CLAIM ON BEHALF
OF THE PLAINTIFF AGAINST COWEN & CO.
LEONARD FUCHS AND BARRETT SINIWITZ,
INDIVIDUALLY.

SIXTY-SIXTH: Plaintiff repeats and realleges each and every allegation contained in the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

SIXTY-SEVENTH: That between March 1971, and December 1972, the defendants BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. and the partners of COWEN & CO., conspired together and maliciously and willfully entered into a scheme to defraud and deceive MICHAEL M. MC LEARN and formed a deliberate design and purpose to coerce and pressure him into entering into a prohibitive, illegal and unethical contract and investment arrangement whereby the defendants induced MICHAEL M. MC LEARN into giving said defendants a complete power of attorney, and that in addition to usual brokerage and other fees, defendants would also receive as compensation for their services, twenty percent of realized capital gains from the sale and reinvestment of securities in MICHAEL M. MC LEARN's account so that the defendants would realize profits and fees at his expense.

SIXTY-EIGHTH: In pursuance of the said conspiracy and scheme, the said defendants did the acts and things hereinafter

alleged, and all of such acts and things were participated in and done by all of the defendants, or by one or more of them as steps in the said conspiracy and for the purpose of defrauding and deceiving MICHAEL M. MC LEARN as hereinbefore alleged

SIXTY-NINTH: Among the acts committed by the defendants in furtherance of the conspiracy aforesaid are the following: in meeting with MICHAEL M. MC LEARN at the office of COWEN & CO. in furtherance of the conspiracy, in coercing and pressuring MICHAEL M. MC LEARN herein to enter into an illegal, prohibitive and unethical investment arrangement or contract; in failing to exercise prudent judgment, acted in bad and breached the fiduciary obligation owed by said defendants to him in purchasing speculative stocks margined to the limit and not revealing the extent or degree of margined assumed; in failing to inform him that the stocks purchased for him were speculative in nature and involved substantial risk for a person in his position, which position was known to the defendants and each of them; in acting totally without his knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of his account by repeatedly informing him that his account was in good financial condition and well secure so as to deceit him, which statements did in fact deceive him; in repeatedly omitting to inform him of material facts with respect to securities recommend-

ed for purchase and for sale from his account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for MICHAEL M. MC LEARN, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for him with his limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to MICHAEL M. MC LEARN and otherwise acted in an illegal, negligent, unethical and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York State Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility, and the defendants committed numberable acts in furtherance of the conspiracy.

SEVENTIETH: That as a result of the foregoing, the plaintiff was caused to sustain substantial monetary damages and

~~was~~ otherwise damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

AS AND FOR A SIXTH CLAIM ON BEHALF
OF THE PLAINTIFF AGAINST COWEN & CO.
AND LEONARD FUCHS AND BARRETT
SINIWITZ, INDIVIDUALLY

SEVENTY-FIRST: Plaintiff repeats and realleges each and every allegation contained in the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

SEVENTY-SECOND: That on January 17, 1975, Laura (McLearn) Stitcher, the daughter of the plaintiff, MILDRED A. MC LEARN, by Assignment of Claims, assigned and transferred all of her right, title and interest in and to all causes of actions and/or claims for damages that the plaintiff, MILDRED A. MC LEARN, may have against COWEN & CO., BARRETT SINIWITZ and LEONARD FUCHS and MERRILL, LUNCH, PIERCE, FENNER & SMITH INCORPORATED, their members, agents and employees, and any and all other third persons presently known or unknown, who may have acted in concert with them, jointly and severally, arising out of and connected with investments in various stocks and securities. The aforesmentioned Assignment of Claim granted to the plaintiff herein, the unrestricted right to sue for recovery for any such damages in any court of competent jurisdiction. Annexed hereto

and made a part of this complaint is a copy of said Assignment of Claims.

SEVENTY-THIRD: That at all times material hereto the defendants, COWEN & CO., through their employees or agents, the defendant partners thereof, and BARRETT SINIWITZ and LEONARD FUCHS, as agents and representatives of COWEN & CO., and individually, communicated to Laura (McLearn) Stitcher; and each of them, made certain representations through the use of the United States mail and interstate telephone and interstate commerce, and said representations were made to induce and consummate certain unlawful representations, schemes and business fraud on said Laura (McLearn) Stitcher.

SEVENTY-FOURTH: That at said meeting, defendants requested that the stocks owned individually by Laura (McLearn) Stitcher be handled by defendants in a similar manner and with the same arrangement as plaintiff, MILDRED A. MC LEARN's account described in paragraph "NINTH" herein.

SEVENTY-FIFTH: That Laura (McLearn) Stitcher entered into an agreement with the defendants, whereby Laura (McLearn) Stitcher gave defendants a complete power of attorney and that, in addition, the usual brokerage and other fees, defendants would also receive as compensation for their services, twenty percent of realized capital gains from the sale and rein-

vestment of the securities in Laura (McLearn) Stitcher's account.

SEVENTY-SIXTH: That thereafter, the investments made by the defendants for Laura (McLearn) Stitcher commenced dwindling in value, and thereafter continued to dwindle in value.

SEVENTY-SEVENTH: That the defendants, BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. failed to exercise prudent judgment acted in bad faith and breached the fiduciary obligation owed by said defendants to Laura (McLearn) Stitcher in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform her that the stocks purchased for her were speculative in nature and involved substantial risk for a person in her position which position was known to the defendants and each of them; in acting totally without her knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of her account by repeatedly informing her that her account was in good financial condition and well secure so as to deceit her which statements did in fact deceive Laura (McLearn) Stitcher; in repeatedly omitting to inform her of material facts with respect to securities recommended for purchase and for sale from her account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for her, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in

making investments not appropriate for her with her limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment, in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to her and otherwise acted in an illegal, negligent, unethical and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility.

SEVENTY-EIGHTH: That thereafter, defendants notified Laura (McLearn) Stitcher that her account had dwindled in value to such an extent that additional cash would be required to maintain marginal limitations.

SEVENTY-NINTH: That Laura (McLearn) Stitcher thereupon became alarmed and caused the account to be transferred to another firm in full, and suffered substantial losses and expense

in salvaging what was left therein.

EIGHIETH: That Laura (McLearn) Stitcher in no case was advised in advance of the quantites of each security which defendants proposed to purchase, nor of the margins which defendants made with respect to the said purchase, and took no part in the management and selection of the purchases made, except for her final decision to close the account with defendants and have another firm take it over.

EIGHTY-FIRST: That at all times Laura (McLearn) Stitcher relied on the judgment and integrity of defendants and was ~~un~~aware of the reckless risks which defendants were taking with her securities and cash.

EIGHTY-SECOND: The arrangements made with Laura (McLearn) Stitcher and defendants, and the actions of the defendants aforementioned were illegal, prohibitive and in violation of the provisions of the Investment Advisors Act and the Securities Act of 1934.

EIGHTY-THIRD: That as a result of the foregoing the plaintiff was caused to sustain substantial monetary damages and was otherwise damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

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AS AND FOR A SEVENTH CLAIM ON
BEHALF OF THE PLAINTIFF AGAINST
COWEN & CO., AND LEONARD FUCHS
AND BARRETT SINIWITZ, INDIVIDUALLY

EIGHTY-FOURTH: Plaintiff repeats and realleges each and every allegation contained in the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

EIGHTY-FIFTH: That between March 1971, and December 1972, the defendants BARRETT SINIWITZ, LEONARD FUCHS and COWEN & CO. and the partners of COWEN & CO., conspired together and maliciously and willfully entered into a scheme to defraud and deceive Laura (McLearn) Stitcher and formed a deliberate design and purpose to coerce and pressure her into entering into a prohibitive, illegal and unethical contract and investment arrangement whereby the defendant induced Laura (McLearn) Stitcher into giving said defendants a complete power of attorney, and that in addition to usual brokerage and other fees, defendants would also receive a compensation for their services, twenty percent of realized capital gains from the sale and reinvestment of the securities in Laura (McLearn) Stitcher's account so that the defendants would realize profits and fees at her expense.

EIGHTY-SIXTH: In pursuance of the said conspiracy and scheme the said defendants did the acts and things hereinafter

alleged, and all of such acts and things were participated in and done by all of the defendants, or by one or more of them as steps in the said conspiracy and for the purpose of defrauding and deceiving Laura (McLearn) Stitcher as hereinbefore alleged.

EIGHTY-SEVENTH: Among the acts committed by the defendants in furtherance of the conspiracy aforesaid are the following: in meeting with Laura (McLearn) Stitcher at the office of COWEN & CO. in furtherance of the conspiracy, in coercing and pressing Laura (McLearn) Stitcher herein to enter into an illegal, prohibitive and unethical investment arrangement or contract; in failing to exercise prudent judgment, acted in bad faith and breached the fiduciary obligation owed by said defendants to him in purchasing speculative stocks margined to the limit and not revealing the extent or degree of margined assumed; in failing to inform her that the stocks purchased were speculative in nature and involved substantial risk for a person in her position, which position was known to the defendants and each of them; in acting totally without her knowledge, acquiescence and specific consent; in making untrue representations concerning the condition of her account by repeatedly informing her that her account was in good financial condition and well secure so as to deceit her, which statements did in fact deceive her; in repeatedly omitting to inform her of

material facts with respect to securities recommended for purchase and for sale from her account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for Laura (McLearn) Stitcher, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for her with her limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution in not diversifying the investments made and the defendants otherwise breached the fiduciary duties owed to Laura (McLearn) Stitcher and otherwise acted in an illegal, negligent, unethical and unprofessional manner which conduct was illegal, prohibitive and in violation of the Constitution and Rule of the New York Stock Exchange, the Investment Advisors Act and the Security Exchange Act of 1934, and in violation of the common law standards of fiduciary responsibility, and the defendants committed numerable acts in furtherance of the conspiracy.

EIGHTY-EIGHTH: That as a result of the foregoing, the plaintiff was caused to sustain substantial monetary damages and was otherwise damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

AS AND FOR AN EIGHTH CLAIM
ON BEHALF OF THE PLAINTIFF
AGAINST MERRILL, LYNCH, PIERCE
FENNER & SMITH INCORPORATED.

EIGHTY-NINTH: Plaintiff repeats and realleges each and every allegation of the complaint hereinbefore set forth with the same force and effect as if here set forth in full.

NINTIETH: That at all times material hereto, the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED, was and still is a corporation, incorporated under the laws of the State of New York, with usual place of business at One Liberty Plaza, 165 Broadway, New York, New York.

NINETY-FIRST: That at all times material hereto, JOHN SHERIDAN, was an agent, servant and representative of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

NINETY-SECOND: That at all times material hereto, the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED through their employees and agents, communicated to Laura (McLearn) Stitcher; and each of them, made certain representations

through the use of the United States mail and interstate telephone and interstate commerce, and said representations were made to induce and consummate certain unlawful representations, schemes and business frauds on said Laura (McLearn) Stitcher.

NINETY-THIRD: That on or about the 11th day of December, 1972, Laura (McLearn) Stitcher contacted the offices of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and asked for a meeting and interview to discuss investments, thereafter, Laura (McLearn) Stitcher met at the offices of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED with JOHN SHERIDAN, employee and agent of said corporation.

NINETY-FOURTH: That Laura (McLearn) Stitcher informed, explained and discussed with JOHN SHERIDAN, in detail the illegal and unethical activities of COWEN & CO., and the partners of COWEN & CO., BARRETT SINIWITZ and LEONARD FUCHS. The said Laura (McLearn) Stitcher further advised MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and JOHN SHERIDAN that she could not afford another debacle. JOHN SHERIDAN assured her that her interests would be well protected, and her investments secure if she should decide to transfer her account to MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

NINETY-FIFTH: That thereafter, Laura (McLearn) Stitcher entered into an investment arrangement or agreement with MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

NINETY-SIXTH: That thereafter, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and JOHN SHERIDAN presented Laura (McLearn) Stitcher with an investment portfolio and encouraged and persuaded Laura (McLearn) Stitcher that said portfolio was safe for a person in her position.

NINETY-SEVENTH: That Laura (McLearn) Stitcher relied upon the assurance of MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and JOHN SHERIDAN, that defendants' investment recommendations protected her and that they should be followed.

NINETY-EIGHTH: That thereafter, Laura (McLearn) Stitcher's account commenced dwindling in value.

NINETY-NINTH: That the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED by and through their agents, servants and representatives, WILLIAM A. SHREYER, IRA L. DAVIS and ROBERT FOY, acted in bad faith, failed to exercise prudent judgment, and breached the fiduciary obligation owed by the defendant to Laura (McLearn) Stitcher in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margined assumed; in failing to inform Laura (McLearn) Stitcher that the stocks purchased for her were speculative in nature and involved substantial risk for a person in Laura (McLearn) Stitcher's position which position was known to the defendants and each of them; in acting totally without Laura

(McLearn) Stitcher's knowledge, acquiescence and specific consent in making untrue representations concerning condition of Laura (McLearn) Stitcher's account by repeatedly informing her that her account was in good financial condition and well secure so as to deceit Laura (McLearn) Stitcher which statement did in fact deceive her; in repeatedly omitting to inform Laura (McLearn) Stitcher of material facts with respect to securities recommended for purchase and for sale from her account including the degree of risk involved in purchasing particularly securities defendants chose to purchase for her, the indicators of present and future financial strength and weakness; in failing to act to curtail or cut losses; in making investments not appropriate for Laura (McLearn) Stitcher with her limited resources by buying speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value; in failing to establish a system for monitoring adverse developments as to allow defendants to make appropriate decisions when adverse developments are perceived; in failing to establish procedures and standards for investment; in failing to observe reasonable caution of conduct which conduct was unprofessional, unethical and in violation of the fiduciary duties owed by defendant to Laura (McLearn) Stitcher in coercing and pressuring her into acquiescing and consenting to an investment arrangement under the threat that unless Laura (McLearn) Stitcher consented to the same she would be given a

qualified, experienced and capable broker; in refusing to accept the power of attorney thereby escaping the responsibility for intimidating Laura (McLearn) Stitcher by telling her she could have access to one of the defendants top customer brokers if Laura (McLearn) Stitcher follows advise without question and informing her that buying a part of America business through MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and the New York Stock Exchange member firms is a good way to increase one's financial worth without adequately revealing the inherent risk and defendants otherwise breached fiduciary duty owed to Laura (McLearn) Stitcher and otherwise acted in an unprofessional negligent, illegal and unethical manner.

ONE-HUNDRED: That at all times, Laura (McLearn) Stitcher relied upon the judgment and integrity of the defendants and was unaware of the reckless risks which defendants were taking with her property, securities, cash and investments.

ONE-HUNDRED ONE: That a fiduciary relationship existed between defendants and Laura (McLearn) Stitcher by reason of the general agency granted to them for compensation, the trust and confidence placed in them and the status of the parties.

ONE-HUNDRED TWO: That the foregoing conduct on the part of the defendants is a breach of the common law standards of fiduciary responsibility in any court of competent jurisdiction.

BEST COPY AVAILABLE

tion.

ONE-HUNDRED THREE: That as a result of the foregoing, plaintiff was damaged in the sum of TWO MILLION (\$2,000,000.00) DOLLARS.

WHEREFORE, the plaintiff, MILDRED A. MC LEARN, demands judgment against the defendant herein as follows:

- 1) On the First Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually in the sum of TWO MILLION (\$2,000,000.00) DOLLARS;
- 2) On the Second Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually, in the sum of TWO MILLION (\$2,000,000.00) DOLLARS;
- 3) On the Third Claim against MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and WILLIAM SCHEYER, ROBERT FOY, IRA L. DAVIS and DONALD REGAN, individually, in the sum of FIVE MILLION (\$5,000,000.00) DOLLARS;
- 4) On the Fourth Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually, in the sum of TWO MILLION (\$2,000,000.00) DOLLARS;
- 5) On the Fifth Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually, in the sum of

TWO MILLION (\$2,000,000.00) DOLLARS;

6) On the Sixth Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually, in the sum of TWO MILLION (\$2,000,000.00) DOLLARS;

7) On the Seventh Claim against COWEN & CO. and LEONARD FUCHS and BARRETT SINIWITZ, individually, in the sum of TWO MILLION (\$2,000,000.00) DOLLARS;

8) On the Eighth Claim against MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED and JOHN SHERIDAN, individually, in the sum of TWO MILLION (\$2,000,000.00) DOLLARS; together with the costs and disbursements of this action.

Dated: Carmel, New York
September 25, 1975

BURCHETTA, GOLDSAND & BURCHETTA, P.C.
Attorneys for the Plaintiff
Office & Post Office Address
48 Glenelida Avenue
Carmel, New York 10512
Telephone: (914) 225-5544

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MILDRED A. MC LEARN, : INDEX NO.

Plaintiff, :
-----x

-against-

ARTHUR COWEN, JR., et al : AFFIRMATION BY ATTORNEY

Defendants.

-----x

STATE OF NEW YORK, COUNTY OF PUTNAM) ss.:

The undersigned, an attorney admitted to practice in the State of New York, affirms:

That the undersigned is a member of the firm of BURCHETTA, GOLDSAND & BURCHETTA, P.C., the attorneys of record for the plaintiff in the within action; that the undersigned has read the foregoing Complaint and knows the contents thereof; that the same are true to affiant's own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to these matters affiant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by plaintiff is that said plaintiff is not now within the county where deponent has his office. The grounds of affiant's belief as to all matters not stated to be upon affiant's knowledge, are facts, investigation, correspondence etc. in deponent's possession.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: September 30, 1975

s/James D. Burchetta
JAMES D. BURCHETTA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
MILDRED A. MC LEARN,

Plaintiff, :

-against-

AFFIDAVIT OF SERVICE

ARTHUR COWEN, JR., et al., :

Defendants. :

-----x
STATE OF NEW YORK)
COUNTY OF PUTNAM) ss.

CARIN E. BENSON, being sworn, says: I am not a party in this action, I am over 18 years of age; I reside at Carmel, New York. On September 30, 1975, I served the within Verified Complaint upon:

WILLKIE FARR & GALLAGHER, Attorneys for Defendant Cowen & Co.

at One Chase Manhattan Plaza, New York, New York; and

BROWN, WOOD, FULLER, CALDWELL & IVEY, Attorney for Defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

at One Liberty Plaza, New York, New York; the addresses, designated by said attorneys for that purpose of depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

this 30th day September, 1975

51
CARIN E. BENSON
ROSEMARIE KRULL
NOTARY PUBLIC, State of New
No. 7374876 - Putnam County
Term Expires March 30, 1976

76

NOTICE OF MOTION DATED NOVEMBER 7, 1975
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

52a

-----X
MILDRED A. McLEARN,

Plaintiff,

-against-

: 75 Civ. 1563 (CMM)

COWEN & CO., MERRILL LYNCH, PIERCE
FENNER & SMITH, INCORPORATED,
BARRETT SINIWITZ and LEONARD FUCHS,
Individually,

NOTICE OF MOTION

Defendants.

: -----X

PLEASE TAKE NOTICE, that upon the Amended Complaint and all prior proceedings had herein, the undersigned will move this Court before Honorable Charles M. Metzner, United States District Judge, Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, Room 2201, on the 28th day of November 1975 at 10:00 a.m. o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order, pursuant to F.R.C.P. Rules 12(b) and 9(b) dismissing the Amended Complaint with prejudice for failure to aver allegations of fraud with requisite particularity and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
November 7, 1975.

Yours, etc.,

BROWN, WOOD, FULLER, CALDWELL & IVEY

By Mary B. Day
(A Member of the Firm)
Attorneys for Defendant Merrill
Lynch, Pierce, Fenner & Smith
Incorporated
One Liberty Plaza
New York, New York 10006
Telephone: (212) 349-7500

TO: BURCHETTA, GOLDSAND & BURCHETTA, P.C.
Attorneys for Plaintiff
48 Gleneida Avenue
Carmel, New York 10512

WILLKIE FARR & GALLAGHER
Attorneys for Defendant Cowen & Co.
One Chase Manhattan Plaza
New York, New York 10005

AFFIDAVIT OF JAMES B. MAY IN SUPPORT OF MOTION
(Dated November 7, 1975)

54a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MILDRED A. McLEARN, :
Plaintiff,

-against- : 75 Civ. 1563 (CMM)

COWEN & CO., MERRILL LYNCH, PIERCE,
FENNER & SMITH, INCORPORATED,
BARRETT SINIWITZ and LEONARD FUCHS,
Individually, : AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS
AMENDED COMPLAINT

Defendants.

-----X

State of New York)
: ss:
County of New York)

JAMES B. MAY, being duly sworn deposes and says:

1. I am a member of the firm of Brown, Wood, Fuller, Caldwell and Ivey, attorneys for defendant Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch") and I make this affidavit in support of a motion pursuant to F.R.C.P. Rules 12(b) and 9(b) for the issuance of an Order dismissing the Amended Complaint herein with prejudice.

2. Plaintiff's Complaint was filed on March 31, 1975 and was thereafter dismissed pursuant to an Order of this Court on July 30, 1975 for failing to set forth facts and circumstances constituting fraud with particularity. Copies of the Complaint and Order are attached hereto and marked Exhibits A and B respectively.

3. Plaintiff was given twenty days within which to file amended pleadings. This was extended until October 1, 1975 by Stipulation and Order and plaintiff filed the Amended

Complaint on September 30, 1975. Defendant Merrill Lynch did not receive said Amended Complaint until October 27, 1975. A copy of the Amended Complaint is annexed hereto and marked Exhibit C.

4. The main allegations against Merrill Lynch are contained in paragraph FORTY-NINTH, pp. 19 through 21 of Amended Complaint. As in the first Complaint, plaintiff's claims are conclusory and vague and give no intelligible notice to Merrill Lynch of the acts or transactions of which complaint is made. Copies of the amended paragraphs are attached hereto and marked Exhibit D.

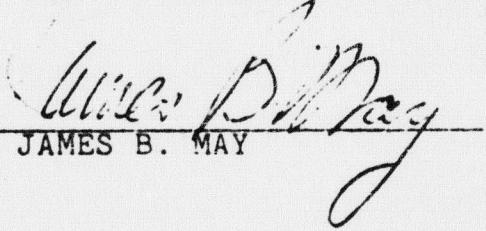
Upon examination of the amendments it is obvious that plaintiff has merely reworded the original complaint and has added more "boiler-plate" language which adds nothing to those allegations previously stated.

In Paragraph FORTY-NINTH of the Amended Complaint Plaintiff alleges that Merrill Lynch "acted in bad faith, failed to exercise prudent judgment..., that the stocks purchased for her were speculative in nature and involved substantial risk for a person in plaintiff's position which position was known to the defendants and each of them..." that Merrill Lynch failed "to establish a system for monitoring adverse developments as to allow defendants to make appropriate decisions when adverse developments were perceived..." Further that defendant bought "speculative stocks margined to the limit and by buying stocks at too high a price level historically and in relation to indicators of value..." that the defendants failed "to exercise prudent judgment, acted

in bad faith and breached the fiduciary obligations owed by said defendants to him..." These allegations set forth by the plaintiff are conclusory in nature and merely reiterate the allegations previously dismissed against defendant Cowen & Company and do not adequately set forth acts constituting fraud with the requisite particularity. Nowhere in the Amended Complaint does plaintiff establish the wheres, whens and hows these alleged events took place.

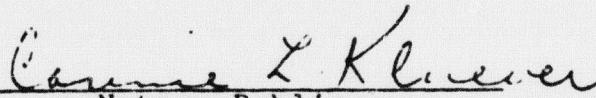
5. Plaintiff has had over two months within which to amend her pleadings and thus far she has failed to establish facts and circumstances with requisite particularity to constitute fraud.

WHEREFORE, the undersigned respectfully prays that an Order be entered herein, pursuant to F.R.C.P. Rules 12(b) and 9(b) dismissing the Amended Complaint herein with prejudice and for such other relief as this Court may deem just and proper.



JAMES B. MAY

Sworn to before me this
7th day of November, 1975.



Caronie L. Klinever

Notary Public
COUNCIL OF NOTARIES OF NEW YORK
NOTARY PUBLIC FOR NEW YORK
No. 24-215161, Queens County
Certificate No. 111, Queens County
Commission Ex. 1977, March 30, 1977

NOTICE OF MOTION DATED NOVEMBER 12, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MILDRED A. McLEARN, :
Plaintiff, :
75 Civ. 1563
-against- : (C. M. M.)
COWEN & CO., MERRILL LYNCH PIERCE FENNER :
& SMITH, INCORPORATED, BARRETT SINIWITZ :
and LEONARD FUCHS, Individually, : NOTICE OF
Defendants. : MOTION
-----X

S I R S :

PLEASE TAKE NOTICE that upon the Amended Complaint
and the Order of this Court entered the 31st day of July, 1975,
copies of which are annexed hereto and all of the prior pleadings
and proceedings had herein, the undersigned will move this Court
before Hon. Charles M. Metzner, United States District Judge,
Southern District of New York, at the United States Courthouse,
Foley Square, New York, New York, Room 2201, on the 28th day of
November, 1975, at 10:00 a.m. or as soon thereafter as counsel
may be heard for an order, pursuant to F.R.C.P. Rules 12(b) and

9(b), dismissing the Amended Complaint for failure to aver the allegations of fraud with the requisite particularity and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
November 12, 1975

Yours, etc.,

WILLKIE FARR & GALLAGHER

By Albert J. Kheel
Attorneys for Defendant,
Cowen & Co.
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

TO: Burchetta, Goldsand & Burchetta, P.C.
Attorneys for Plaintiff
48 Gleneida Avenue
Carmel, New York 10512

Brown, Wood, Fuller, Caldwell & Ivey
Attorneys for Defendant
Merrill Lynch Pierce Fenner & Smith,
Incorporated
One Liberty Plaza
New York, New York 10006

MEMORANDUM IN SUPPORT OF NOTICE OF MOTION DATED
NOVEMBER 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MILDRED A. McLEARN, :
Plaintiff,
-against- : 75 Civ. 1563 (CMM)
COWEN & CO., MERRILL LYNCH, PIERCE,
FENNER & SMITH, INCORPORATED,
BARRETT SINIWITZ and LEONARD FUCHS,
Individually, :
Defendants.

-----X

MERRILL LYNCH'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
AMENDED COMPLAINT

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") hereby moves for an order seeking dismissal of the Amended Complaint herein with prejudice pursuant to Rules 12(b) and 9(b) of the Federal Rules of Civil Procedure for plaintiff's failure to aver the allegations of fraud with requisite particularity.

This action was commenced on March 31, 1975. The Complaint was dismissed on July 30, 1975 for alleging fraud in general terms and for failing to set forth facts and circumstances constituting the alleged fraud with particularity.

The Amended Complaint, filed on September 30, 1975, is substantially the same in its treatment of facts and circumstances as the original Complaint and should be dismissed with prejudice since plaintiff has already had an opportunity to file corrected pleadings.

The basic claim for relief against Merrill Lynch as best we can determine is set forth in paragraph FORTY-NINTH, pp. 19 through 21 of the Amended Complaint. A comparison of the Amended Complaint with the original bears out the fact that plaintiff has not added anything substantial to the original complaint and has merely reiterated the same allegations with additional "boiler-plate" language that still does not aver allegations of fraud with requisite particularity and gives Merrill Lynch no intelligible notice of the specific acts or transactions of which Complaint is made, except in the most vague and conclusory terms, and it should not, therefore, be required to respond to this pleading which seeks a recovery of at least \$5,000,000.

ARGUMENT

PLAINTIFF HAS FAILED TO ALLEGE HER ALLEGATIONS OF FRAUD WITH THE REQUISITE PARTICULARITY

It is settled law in this Circuit that broad, conclusory allegations are insufficient to support a Complaint, much less a judgment, under Rule 10b-5. Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir., 1973); Segal v. Gordon, 467 F.2d 602

(2d Cir. 1972) ("mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient" quoting from Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971)); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964) ("[T]here must be allegations of facts amounting to deception or fraud will not suffice"); Goldberg v. Shapiro, CCH Fed. Sec. L. Rep. par. 94, 813 at 96,717 ("Rule 9(b) requires particularized pleading of the 'circumstances' - not simply facts or elements of a cause of action"); Zammas Jagid, CCH Fed. Sec. L. Rep. par. 94,342 (S.D.N.Y. Dec. 28, 1973) "these counts do not allege with any particularity which statements are attributable to which defendants and the circumstances in which they were made. They fail the test of Rule 9(b) Federal Rules of Civil Procedure and must be dismissed". Leonard v. Colton [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. par. 92,284 at 97,3171 (E.D.N.Y. Sept. 12, 1968) ("a complaint which alleges fraud must be more specific than the notice pleading, which is inadequate for other complaints in federal courts"). See also F.R.C.P. Rule 9(b).

The instant Complaint - though admittedly prolix - completely fails to satisfy these settled requirements. Nowhere are any facts pleaded which set forth with particularity the fraud alleged. Nowhere are the circumstances of the alleged wrongdoing set forth.

This Court in Goldberg v. Shapiro, supra, at 96,717, specifically rejected a conclusory Complaint that alleged without particularity "understatements" and "overstatements" in a financial statement because:

"There is no mention of specific amounts understated or overstated (by Touche Ross), no mention of who, specifically caused the understatement or overstatement, no allegation of the circumstances of misconduct save for the bare allegations mentioned above. There is, in short, insufficient particularity." [Emphasis added].

In Levy v. First National City Bank, et al., 75 Civ. 1335 (S.D.N.Y., August 26, 1975), Judge Owen found the complaint to be inadequate:

"... defendant is entitled to know what the contents were of the 'doubts about the management of UDC ... the allegations state only that certain times were 'not adequately disclosed.' These allegations should specify those statements made ... and indicate to what extent they are false, inaccurate, or insufficient and/or state precisely that statements should have been made ... [d]efendants are entitled to know in what specific ways plaintiff claims that the financial picture ... was distorted or incomplete ..."

So, too, should this Court reject plaintiff's conclusory and vague allegations of bad faith, misrepresentation and failure to "heed adverse economic developments". As the Second Circuit held in Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972), "a complaint cannot escape the charge that it is entirely conclusory in nature merely by quoting such words from the statute as 'artifices, schemes and devices to defraud' and 'scheme and conspiracy.'"

The allegations here are "merely conclusory and clearly do not apprise the defendants of the claims made against them.... Some further explanation of the allegations is necessary to indicate how they constitute fraud."

Felton v. Walston & Co., 508 F.2d 577, 581 (2d Cir. 1974).

For example, no mention is made in the amended complaint of who specifically caused or made any representation, and to whom. Similarly absent are any allegations which describe the circumstances under which the author or authors of the representation caused it to be made, that is, the whens and wheres of the alleged fraudulent representations. Finally, the amended counts do not reveal the specific representations with respect to specific securities transactions which are the essential elements of a claim for securities fraud under the Securities Exchange Act.

The Plaintiff has had ample opportunity to replead her claims and has failed to do so. In Robertson v. National Basketball Association, 67 F.R.D. 691, 698 (S.D.N.Y. 1975), the Court found that the "Amended Count Three still appears to merely allege a failure of performance. The ABA has had sufficient opportunity to redraft the count to assert a claim of fraud properly if such claim existed. See, Segal, supra, 467 F.2d at 607-608. Accordingly, the NBA's motion to dismiss amended Count Three with prejudice is granted. Felton, supra, 508 F.2d at 582; Mooney v. Vitolo, 435 F.2d

838, 839 (2d Cir. 1970); Cf. Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)."

The requirement that averments of fraud be made with particularity is a sound one. Its appropriateness here is patent. Plaintiff apparently is unhappy that some of her investments went down in value during a recession, when almost all stocks went down in value. This hardly amounts to a securities violation. She has not presented a specific grievance or a specific misrepresentation, and her amended complaint is plainly insufficient in law and should be dismissed with prejudice.

Respectfully submitted,

BROWN, WOOD, FULLER, CALDWELL & IVEY
Attorneys for Defendant Merrill
Lynch, Pierce, Fenner & Smith,
Incorporated
One Liberty Plaza
New York, New York 10006
Telephone: (212) 349-7500

OF COUNSEL:

James B. May
Gary L. Berenholtz

MEMORANDUM IN SUPPORT OF NOTICE OF MOTION DATED
NOVEMBER 12, 1975UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MILDRED A. McLEARN, :
Plaintiff, :
-against- : 75 Civ. 1863
COWEN & CO., MERRILL LYNCH PIERCE : (C.M.M.)
FENNER & SMITH, INCORPORATED,
BARRETT SINIWITZ and LEONARD FUCHS, :
Individually, :
Defendants. :
-----x

MEMORANDUM IN SUPPORT OF
THE MOTION OF COWEN & CO. TO
DISMISS THE AMENDED COMPLAINT

This memorandum is submitted on behalf of defendant Cowen & Co. ("Cowen") in support of its motion to dismiss the Amended Complaint herein. Since the Court is already familiar with the facts involved, and which are more fully set out in Merrill Lynch's moving papers dated November 10, 1975 seeking to dismiss the Amended Complaint as to it, there is no need to repeat the background again.

This action was commenced by the filing of a complaint on March 31, 1975 ("Original Complaint"), charging Cowen, among others, with violations of various provisions of the securities laws.

By Notice of Motion dated April 21, 1975, Cowen moved for an order dismissing the Original Complaint on the ground that it did not state with the requisite particularity the facts and circumstances surrounding plaintiff's charges. Defendant Merrill Lynch joined in the motion.

By order entered July 31, 1975, a copy of which is annexed to the Notice of Motion served herewith, this Court dismissed the Original Complaint as to all defendants, with leave to plaintiff to file an amended complaint within twenty days. The Court inter alia, held that:

"The complaint runs thirty-nine pages and in one hundred three paragraphs sets forth eight counts, all in general terms alleging a fraud based on breach of fiduciary duty and tracing the boilerplate language of the statutes and regulations involved.

Plaintiff contends that '[t]he complaint sets forth, in great detail, plaintiff's position'. I agree that it sets forth plaintiff's position, but not the facts and circumstances constituting the alleged fraud. That is what is required, and that is what plaintiff has failed to allege with particularity. Bare conclusory allegations of fraud are insufficient." (Citations omitted)

By Notice of Motion dated August 18, 1975, plaintiff moved this Court for an extension of time to file an amended complaint. Plaintiff's attorney urged in his affidavit in support of that motion, that this extension was necessary because

"The decision of this Court requiring the plaintiff to serve an amended complaint will necessitate your deponent and the plaintiff completely revamping and reconstructing the complaint to aver the allegations of fraud with the requisite particularity."

Thus, even Plaintiff expressly recognized that compliance with this Court's prior order would have necessitated a complete "revamping and reconstructing" of the Original Complaint. Nevertheless, the Amended Complaint is virtually identical to the Original Complaint except, that instead of being a mere 39 pages, it has somehow become 44 pages without any additional specifications as to the facts and circumstances surrounding the plaintiff's claims. With respect to the claims against Cowen the Amended Complaint reads exactly the same as the Original Complaint with the exception of a sprinkling of insignificant linguistic changes in paragraphs EIGHTEENTH, TWENTY-EIGHTH, FIFTY-NINTH, SIXTY-NINTH, SEVENTY-SEVENTH and EIGHTY-SEVENTH. These "changes", however, are ones of semantics rather than of substance, and the Amended Complaint remains as defective as the Original Complaint.

Each of the paragraphs mentioned above are virtually identical in substance. While plaintiff's "Amended Complaint" makes various conclusory allegations as to Cowen's supposed failure to exercise prudent judgment, its bad faith and its breach of fiduciary obligations, it

still fails to state in what manner Cowen's judgment was less than prudent or its faith bad. While the Amended Complaint again claims that Cowen purchased "speculative stocks", it still fails to allege not only how the stocks were speculative but which stocks are involved. Likewise, while plaintiff charges Cowen with making untrue representations and failing to inform plaintiff of material facts, she fails to allege any representations made by the defendant at all, let alone the manner in which they were untrue. Similarly the Amended Complaint is devoid of any allegations concerning the "material facts" as to which plaintiff was uninformed.

The Amended Complaint is nothing more than a verbatim repetition of the Original Complaint dismissed by this Court. It is obvious that plaintiff has neither complied with this Court's prior order nor made any good faith attempt to do so. Its Amended Complaint clearly fails to plead the allegations of fraud with the requisite particularity. See Court's Opinion p. 2, Merrill Lynch Brief (pp. 2-6).

For the reasons stated above plaintiff's Amended Complaint should be dismissed.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
Cowen & Co.
1 Chase Manhattan Plaza
New York, New York 10005

DAVID L. FOSTER
ROBERT J. KHEEL
ROBERTA L. TROSS

Of Counsel

MEMORANDUM IN OPPOSITION TO BOTH NOTICES OF MOTION
DATED NOVEMBER 26, 1975UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MILDRED A. MC LEARN, :
Plaintiff, : 75 Civ. 1563
Judge Metzner

-against- :
COWEN & CO., MERRILL LYNCH PIERCE :
PEPPER & SMITH, INCORPORATED, :
BARRETT SINIWITZ and LEONARD FUCHS, :
Individually, :
Defendants. :
-----X

PLAINTIFF'S MEMORANDUM IN OPPOSITION

This action is instituted by the plaintiff, MILDRED A. MC LEARN, against the defendant, COWEN & CO. et al, for alleged violations of the Securities Exchange Act of 1934 and the Investment Advisors Act of 1940, as well as for damages for defendant's breach of its common law standards of fiduciary responsibility owed to the plaintiff, and defendant's illegal, negligent, unethical and unprofessional conduct.

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT COMPLIES
WITH THE REQUIREMENTS OF RULE 9
(1) OF THE RULES OF CIVIL
PROCEDURE

That prior hereto the defendants, COWEN & CO. and MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, instituted motions for an order dismissing the complaint for failure to aver the allegations of fraud with the requisite particularity.

The Honorable Charles Metzner in opinion number 42892 entered on the 31st day of July, 1975, dismissed the complaint with leave to the plaintiff to file amended complaint. The plaintiff thereafter filed its amended complaint within the proper time allowed by the Court. The amended complaint cured the defects of the original complaint and does in fact reveal the facts and circumstances constituting the alleged fraud.

The complaint does not simply state conclusory statements and allegations as claimed by defendants counsel. It appears that the defendant is more upset over the fact that it was not necessary for the plaintiff to completely revamp and reconstruct the complaint than he is with whether or not the amended complaint meets the specificity requirements of Rule 9B. In paragraphs numbered EIGHTEENTH, TWENTY-EIGHTH, FIFTY-NINTH, SIXTY-NINTH, SEVENTY-SEVENTH, and EIGHTY-SEVENTH, with respect to the defendant, COWEN & CO., the plaintiff cured the defects basing each heretofore conclusory statement on facts and information, so as to fully

apprize the defendants of the conduct for which the plaintiff now sues. For example, plaintiff claims that the defendants "failed to exercise prudent judgment, acted in bad faith and breached the fiduciary obligation owed by the defendants to the plaintiff" by "purchasing speculative stocks margined to the limit and not revealing the degree; in failing to inform plaintiff that the stocks purchased for her were speculative and involved substantial risks for a person in plaintiff's position..."

The defendant, COWEN & CO., claims that plaintiff's complaint is defective because plaintiff failed to allege "how the stocks were speculative" and "which stocks are involved". The plaintiff respectfully submits that plaintiff is not required to plead detailed evidentiary matter in her complaint. (See point II)

The defendant has numerous discovery procedures available to them, and in fact, has served voluminous written interrogatories of at least 200 pages requesting the same information. Plaintiff is under no obligation to list each and every speculative stock it claims defendant purchased.

The plaintiff further claimed that the defendant made untrue representations concerning the conditions of plaintiff's account by repeatedly informing plaintiff that her account was in good financial condition. Plaintiff is under no obligation and requirement to set forth each and every conversation in which it is alleged that defendants represented the conditions of plaintiff's account. The plaintiff has properly apprized the defendants of the conduct for which she now sues and sufficient information to allow them to frame an answer.

The plaintiff further alleged that the defendants were negligent in failing to "establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived" and also by failing to "establish procedures and standards for investment". The plaintiff cannot possibly be more particular or specific with respect to said allegations.

The plaintiff has pleaded each and every fact and information within her knowledge and information. It must be remembered that plaintiff was a widow and at the time of her involvement with the defendants herein, she relied solely upon their advices and experience. Much of the information and facts which defendant now claims that plaintiff should include in her complaint are solely within the knowledge of the defendant. It was the acts of their employees, agents and servants who involved them in this occurrence and undoubtedly they have facts, statements, memorandums, agreements, etc. solely within their possession.

The defendants can easily respond to the complaint and are simply using the prior motion to dismiss and this motion as a defense tactic to avoid a confrontation with this plaintiff, who has suffered not only great monetary loss as a result of their acts, but who has suffered irreparable other damages, including disruption of family ties, etc., for which there is no recourse and which will trouble plaintiff the rest of her natural life.

Plaintiff's amended complaint complies with the requirements of Rule 9B.

POINT II

PLAINTIFF IS NOT REQUIRED TO PLEAD DETAILED EVIDENTIARY MATTER IN HER COMPLAINT.

The defendant, herein, COWEN & CO., is requesting the plaintiff to set forth detailed evidentiary matter in her complaint. The plaintiff is not required to do so under the Federal Rules of Procedure. The defendant has various discovery procedures available to them, and, in fact, has served simultaneously with this instant motion to dismiss, voluminous written interrogatories of at least 200 pages which must be answered by plaintiff. The plaintiff is not required to plead evidence. Brady vs. Games, 76 U.S. App. D.C. 47, 128 F 2d 754 (1942); Collins vs. Rukin, 342 F Supp. 1282 (D. Mass. 1972). Annexed hereto are said interrogatories marked Exhibit "A".

The statements set forth in plaintiff's complaint are fully evidenced and substantiated by all facts and information known to the plaintiff at this time. The plaintiff has pleaded and asserted many facts and information with as much detail as plaintiff possibly can state without further discovery. In Seligson vs. Plum Tree, Inc., 61 FRD 343 18 P.R. Serv. 2d 94 (1973), the Court stated at page 347,

"Rule 9 (b) does not require, nor does this Court intend, the plaintiffs be barred from bringing an action based on fraudulent misrepresentation. Nor do we require plaintiffs to perform the impossible. They have alleged fraud with as much specificity as they are able to do without further discovery. Plaintiffs have now pleaded with sufficient particularity to apprise defendants of the alleged fraudulent misrepresentations as well as how they were conveyed to plaintiffs and during what time period. Further particularities may be explored by both sides during discovery. Rule 9 (b) understood in the context of the liberal Federal Rules of Pleading requires no more."

POINT III

THE REQUIREMENTS OF RULE 9 (b)
ARE RELAXED AS TO MATTERS WITHIN
THE ADVERSE PARTY'S KNOWLEDGE.

Many of the facts and information which defendant herein suggests that plaintiff should include in the complaint are within the knowledge of defendant. The defendant, COWEN & CO., has available to them more information and facts than does plaintiff. Defendant, undoubtedly, has a complete record of plaintiff's account, including the stocks purchased and sold by defendant on plaintiff's behalf, copies of all agreements entered into between plaintiff and defendant, power of attorney, records of meetings, statements made by defendant, etc. In Segal vs. Gordon, 467 Fed. 2d 602 (2d Cir. 1972), the case cited

by defendant, the Court acknowledged the fact that the requirements of Rule 9 (b) should be relaxed as to matters particularly within the adverse party's knowledge. The defendants herein have full knowledge of their own actions, have easy access to all the complete records which they must keep and would not be prejudiced in any way if required, by this Court, to interpose an answer based upon the complaint as drafted, which complaint sets forth, in an organized and succinct manner, claims against the defendant herein.

Respectfully submitted,

BURCHETTA, GOLDSAND & BURCHETTA, P.C.
Attorneys for Plaintiff
Office and Post Office Address
48 Glebeida Avenue
Carmel, New York 10512
Telephone: (914) 225-5544

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MILDRED A. MC LEARN, : 75 Civ. 1563
Plaintiff, : Judge Metzner

-against- :
COWEN & CO., MERRILL LYNCH :
PIERCE, FENNER & SMITH, :
INCORPORATED, BARRETT SINIWITZ :
and LEONARD FUCHS, Individually, :
Defendants. :
-----x

STATE OF NEW YORK)
: SS.:
COUNTY OF PUTNAM)

CYNTHIA LAPOINTE, being duly sworn, deposes and says that she is employed by BURCHETTA, GOLDSAND & BURCHETTA, P.C., attorneys for the above named plaintiff herein. That on the 26th day of November, 1975, she served the within Memorandum in Opposition upon WILLKIE, FARR & GALLAGHER, the attorneys for the defendant, COWEN & CO., by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Post Office regularly maintained by the United States Government at Carmel, New York, in said County of Putnam, directed to said attorney for the defendant, COWEN & CO., at One Chase Manhattan Plaza, New York, New York 10005, that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail. Deponent is over the age of twenty-one years.

7/ CYNTHIA LAPOINTE

Sworn to before me this
26th day of November, 1975.

3/ JUNE KASPER
Notary Public, State of N.Y.
Qualified in Putnam County
Commission Expires Mar. 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILDRED A. MC LEARN,

Plaintiff, : 75 Civ. 1563
Judge Metzner

-against-

COWEN & CO., MERRILL LYNCH PIERCE:
FENNER & SMITH, INCORPORATED,
BARRETT SINIWITZ and LEONARD :
FUCHS, Individually.

**AFFIDAVIT OF SERVICE
BY MAIL**

Defendants.

STATE OF NEW YORK)
: SS.:
COUNTY OF PUTNAM)

CYNTHIA LAPOINTE, being duly sworn, deposes and says that she is employed by BURCHETTA, GOLDSAND & BURCHETTA, P.C., attorneys for the above named plaintiff herein. That on the 26th day of November, 1975, she served the within Memorandum in Opposition upon BROWN, WOOD, FULLER, CALDWELL & IVEY, the attorneys for the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, by depositing a true copy of the same securely enclosed in a postage paid wrapper in the Post Office regularly maintained by the United States Government at Carmel, New York, in said County of Putnam, directed to said attorneys for the defendant, MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, at One Liberty Plaza, New York, New York 10006, that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office, between which places there then was and now is a regular communication by mail. Deponent is over the age of twenty-one years.

2020 RELEASE UNDER E.O. 14176

Sworn to before me this
26th day of November, 1975.

51

JUNE KASPER
Notary Public, State of N.Y.
Qualified in Putnam County
Commission Expires Mar. 30, 1976

COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILDRED A. MC LEARN,
Plaintiff- Appellant,

Index No.

- against -

COWEN & CO. et al.,
Defendants- Appellees.,

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

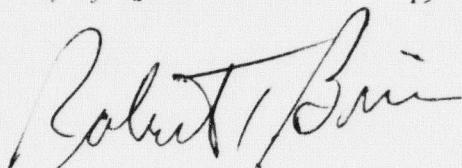
I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

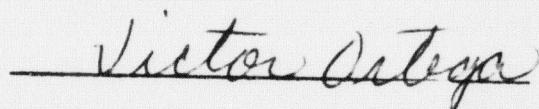
That on the 12th day of April 1976 at 1) One Liberty Street, New York, New York
deponent served the annexed Appendix ~~Brief~~ Brief 2) One Chase Manhattan Plaza, New York, New York
upon

1) Brown Wood Fuller Caldwell &
2) Wilkie Farr & Gallagher

the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 12th
day of April 1976





VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977